No. 00-1932

In the

Supreme Court of the United States

Mary Ann DiBari, individually and as lawful guardian of minor children, Krystal M. DiBari and Tiana N. DiBari,

Petitioner,

versus

Bedford Central School District *et al.*,

AND

Robert M. Altman *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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I. The Petition for certiorari is not premised on any claim of erroneous fact-finding.

Respondents' brief in opposition to the Petition for certiorari portrays the Petition as "an argument that the Circuit Court made erroneous factual findings." (OB.3)[1] On the contrary, both the Petition and the circuit court opinion note that the essential facts are undisputed. (Pet.2; App.3a)

The Earth Day Liturgy

Concerning the "Earth Day liturgy," respondents' brief either admits or concedes the following facts:

- Each year on "Earth Day" the entire high school student body was summoned by drums to assemble around a large globe on a tripod, which was "the center of the Earth Day celebration." (OB.4)
- Before this globe, students presented "symbolic gifts" or "metaphorical gifts" *to the Earth*, including "wisdom, knowledge and respect." (OB.4-5)
- The ritual was devised and coordinated by teacher Saltzman, whose own memorandum states that the purpose of the ritual is "an *honoring of the Earth* as the home of all of us." (Lodging.1-3)
- The student newspaper observed that the ritual involves "conducting ceremonies *to honor the earth*." (Lodging.1)
- Saltzman delivered Earth-oriented speeches before the globe on the tripod, including: "We come from the Earth, we're part of the Earth, and we're all involved in this cycle," and "There's just too many people on this Earth. We need to do something about that." (OB.4)

Since none of these facts was disputed, the Petition does not rest on any claim of "erroneous factual findings." (OB.3) Rather, the Petition seeks this Court's *de novo* review of the circuit court's constitutional errors in overturning the district court's legal conclusion that the "Earth Day liturgy" violated

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[1]. "OB" signifies respondents' opposition brief.

the First Amendment. The circuit court's contrary legal conclusion conflicts with relevant decisions of this Court and the decisions of other circuits which follow this Court's "subtle coercive pressure" standard for Establishment clause violations in public schools. Further, this case presents an opportunity for this Court to clarify whether "subtle coercive pressure" is the standard for determining violations under both religion clauses.

For these reasons, the Petition conforms to the criteria in Rule 10 (c) of the Rules of the Supreme Court.

Rather than addressing the undisputed facts, respondents do precisely what they accuse Petitioner of doing: debate the facts. For example, respondents cite a self-serving affidavit from the defendant high-school principal: "there is no religious purpose to this observance [the Earth Day ceremony] and that *any religious content, if it occurs, is purely incidental.*" (OB.5) Of course, there is no *de minimis* defense to Establishment Clause violations. *Lee*, 505 U.S. at 594. Thus, the affidavit's implication that "incidental" religious activity in the Earth Day liturgy is acceptable verges on a stipulation of liability.

Petitioner takes exception to respondents' claim that the Petition "misrepresents" the record when it describes the Earth Day ritual as "the Earth Day liturgy" and the globe on a tripod as an "Earth totem." (OB.15) Both descriptions are taken from *the findings of the district court*. (App.143a, 72a)

Equally false is respondents' claim that the Petition "misrepresents" the record by stating that "a chorus of ceremonial tom-toms played throughout the ritual." (*Id.*) It was the district court, not Petitioner, which found that the "Earth Day liturgy" involved "a chorus of ceremonial drums" (App.70a) and that the "chorus of drums [was] playing throughout the presentations." (App.144a)

In fact, it is respondents who misrepresent the record—repeatedly. For example, respondents falsely assert that the Saltzman memorandum states "merely that there should be an honoring of the elders" and "respect for the Earth" (OB.3),

when it also states: "At the core of each gathering has been and will continue to be *an honoring of the Earth* as the home of all of us," and that students would be expected to present "gifts given by each of us to others *and to the Earth* in the form of encouragement, *compliments*, help and *service*."

Respondents also misrepresent the record when they assert that there is "no contrary evidence" to rebut the claim of former principal Kraemer that attendance at the Earth Day liturgy was not compulsory. The student newspaper described the ritual as "a bunch of teachers and Student Government kids running a ceremony that *we had to watch*." (Lodging, p.2) Even the circuit court noted that "Bedford characterized the Earth Day activities as, in part, an effort to comply with § 810 of the New York Education Law" which provides that "*It shall be the duty of the authorities of every public school in this state to assemble the pupils*" to participate in appropriate Conservation Day activities. (App.11a) In other words, respondents have claimed that attendance at the Earth Day liturgy is either "optional" or statutorily mandated, depending on which claim serves their interests at the moment.[2]

Classroom Prayers to the Earth

Here too the facts are undisputed: a Bedford teacher played audiotaped prayers to the Earth, including: "Holy Earth Mother, the trees and all nature are witnesses of your thoughts and deeds." (App.147a) If the prayer had been instead "Holy Mary, Mother of God, all of nature is witness to the creation of your son, Jesus," there is little doubt that the circuit court would have affirmed the district court's injunction.

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[2] In any case, the Petition does not rest on any factual dispute over whether attendance at the Earth Day liturgy was strictly mandatory, since this Court's "subtle coercive pressure" standard–which the circuit court failed to follow—does not require a showing of mandatory attendance at a challenged public school activity. *Lee,* 505 U.S. at 594-95.

Respondents further misrepresent the record by claiming "there is absolutely no evidence in the record that any student ever heard the prayers [to the Earth]" played in the middle school classroom. (OB.10) Even the circuit court noted that "Mary Ann DiBari testified, however, that her granddaughter Tiana heard the prayers or invocations." (App.14a) Respondents themselves admit that teacher Funari testified only that she "believed" no student heard the prayers because she (allegedly) turned down the volume whenever a prayer was uttered. (OB.11) The district court was evidently not persuaded by Bedford's "volume control" defense, and its finding that the prayers were heard was not disturbed by the circuit court, which dismissed the claim based solely on its view of standing.

Lord Ganesha

Respondents' opposing brief admits that students in the elementary school were instructed by their teacher to make "a paper cutout of the elephant-headed Hindu God 'Ganesha.'" (OB.2) Respondents—once again arguing issues never reached by the circuit court—characterize this activity as "cultural study." (OB.7-8) The district court, however, found that directing elementary school children to make an image of a Hindu god violates the First Amendment. (App.120a; 72a) That is, the district court applied the First Amendment to images of Lord Ganesha just as surely as it would have been applied to images of Jesus Christ.

The circuit court never addressed the district court's factual finding that the children were also instructed to make clay images of the Hindu deity, but ran out of time to do so. (App. 118a) Respondents, in a further factual argument, suggest that the teacher-witness was more credible than the student witnesses on this point. (OB.9) For purposes of this Petition, however, all the district court's fact-finding on Ganesha remains undisturbed.

Worry Doll Talismans

Respondents do not really deny Bedford's promotion of the

classroom creation and purchase in the school store of talismanic "worry dolls," which students were told would take away their bad dreams and worries if placed under their pillows. (App. 120a-121a) Instead, respondents suggest that the testimony of their student-witness on this point is more credible than that of Petitioner's student-witnesses. (OB.10) But here too the district court's fact-finding remains undisturbed by the circuit court, due to the circuit's decision on standing.

In sum, respondents fail to demonstrate their claim that the Petition is merely an argument over fact-finding.

II. The Establishment Clause bars state promotion of any religious practice or concept.

Respondents' opposing brief, like the circuit court opinion, wrongly casts the legal issue regarding the Earth Day liturgy in terms of whether the ritual promoted an *organized religion* of Earth-worship or Gaiaism. (App. 57a; OB.13-14) Respondents have failed to address, and thus conceded, the Petition's argument that the Establishment clause prohibits not merely state advancement of an organized religion as such, but also any religious *concept* or practice, "even though it is neither a part of nor derives from a societally recognized religious sect." *Malnak v. Yogi*, 440 F. Supp. 1284, 1313 (D.N.J. 1977), *aff'd*, 592 F.2d 197 (3rd Cir. 1979). That is why this Court has made it clear that the state may not use its power to promote any "particular kind of religious concept." *Torcaso v. Watkins*, 367 U.S. 488, 494 (1961). Accordingly, in *Lee* this Court found an Establishment Clause violation in the form of subtle coercive pressure to attend a commencement address including a fleeting, non-denominational invocation unattached to any religion.

The circuit court reached the erroneous legal conclusion that a ceremony in which student leaders honor the Earth and offer gifts of "wisdom, knowledge and respect" and "service"

no way be seen by an impressionable *student* observer as state endorsement of the *religious concept that the earth is a higher* being deserving of worship and praise. (OB.52) That legal conclusion is inconsistent with the broad view of religion this Court and other circuits have taken for purposes of Establishment Clause analysis. (See, Pet.14)

Indeed, the circuit court itself has noted in another case that for Establishment Clause purposes the term "worship" is broadly understood as "'[t]he reverent love and *devotion* accorded a deity, *an idol*, or a sacred *object* [and][t]he ceremonies, prayers, or other religious forms by which this love is expressed,'" and that the term "prayer" means "[a] reverent Petition made to God, a god, or *another object of worship*.'" *DeStefano v. Emergency Housing Group, Inc.* 247 F.3d 397, 412, n. 8 (2nd Cir. 2001) There is no question that the Earth Day liturgy involved at least student expression of "devotion" to an "idol" or "sacred object"—namely, the planet Earth—and "reverent petitions" to the Earth in form of the "metaphorical gifts" students were induced to present before the Earth-totem.

Recognizing that the circuit court took a rather blinkered view of the term "religion," respondents attempt to amplify the circuit court's opinion by claiming the court held that "no objective observer would perceive that the Earth Day ceremonies as an endorsement of the Gaia religion *or any other religious practice.*" (OB.17) The circuit court held nothing of the kind. Its analysis focused on whether the Earth Day liturgy promoted the Gaia religion. (See, App.57a-58a)

III. Respondents (like the circuit court) contradict this Court's "subtle coercive pressure" standard.

As argued in the Petition, the circuit court ignored and contradicted this Court's standard in *Lee* of "subtle coercive pressure" for Establishment Clause violations, holding instead that the Earth Day liturgy was not coercive merely because

that the Earth Day liturgy was not coercive merely because attendance was not "required." (Pet.19; App. 56a, 63a) The circuit court therefore failed to consider whether coercion was present in the form of the peer or social pressure this Court deemed impermissible in *Lee*, 505 U.S. at 594-95 and in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311-12 (2000). In fact, the circuit court never once considered that it was dealing with impressionable youth—a key factor in this Court's school cases. *Lee*, 505 U.S. 577 at 592.

Respondents concede this point by failing to address it in their opposing brief. Instead, they merely assert (OB.15) that "the element of coercion identified in *Lee* was also not met because there was no obligation on the part of students to participate in the ceremonies."—precisely the argument rejected in *Lee*.

Recognizing that the circuit court failed to follow the "subtle coercive pressure" standard, respondents argue for a finding that the circuit court never made: that there was no peer or social pressure to attend the Earth Day liturgy. (OB.15-16) The undisputed record facts, however, are that the Earth Day liturgy was part of the curriculum for the whole "Fox Lane family"—even assuming it was not formally mandatory—was devised to comply with the statutorily mandated Conservation Day observances, and was an activity which, as one student complained, "we *had to watch*." (See, Pet.5) The existence of at least peer or social pressure to attend is undeniable, and the circuit court did not find otherwise.

IV. Petitioner does not seek to "modify" the requirement of governmental compulsion in free exercise analysis.

Contrary to what respondents suggest Petitioner does not seek certiorari "to modify the well settled rule that a governmental act of compulsion must exist for there to be a

have completely misread the Petition on this point.

The Petition requests certiorari in part so that this Court can clarify *what level* of governmental compulsion triggers a free exercise violation in the public school setting. Even respondents concede that this Court requires only "some compulsion" by government. (OB.18) How, then, is the standard of "some compulsion" in the realm of free exercise different from the "subtle coercive pressure" standard for Establishment Clause cases? Petitioner believes that (at least in the public school context) the two standards are functionally identical, and that this Court should say so.

Citing inapposite textbook challenge cases, respondents assert there was no governmental compulsion here but only mere exposure to offensive ideas. But respondents fail to mention that in *Grove v. Mead School District*, 753 F.2d 1528 (9th Cir. 1985), the Ninth Circuit noted that if the reading of morally offensive textbooks were alleged to have "eternal consequences" for plaintiff's child, "such a belief might well require her being excused from . . . exposure" on free exercise grounds, and that a free exercise claim would probably have been presented if the child had been forced to read the material *or even to hear it read* in class. *Id.* at 1543.

In *Mozert v. Hawkins County Board of Ed.*, 827 F.2d 1058 (6th Cir. 1987) the Sixth Circuit found "no proof in the record that any plaintiff student was required to engage in role play, make up magic chants, read aloud or engage in the activity of haggling," but that even "some compulsion" to engage in such activities would have given rise to a colorable Establishment Clause claim. *Id.* at 1069. Why not also a free exercise claim?

V. Respondents' standing argument avoids the issues.

Respondents' opposing brief fails to address, and thus concedes, the Petition's argument that the district court correctly concluded that Petitioner, who has custody of two grandchildren

in Bedford's high school, was entitled to a district-wide injunction since the challenged activities (such as audio-taped prayers to the Earth) were likely to recur in any district school, and that Petitioner therefore had standing because she has two children in the defendant school system. (App.78a) (Pet.26-27) The circuit court likewise did not address this argument. (App.47a-50a) [3]

As for municipal taxpayer standing, respondents' effort to distinguish *Koenick v. Felton*, 190 F.3d 259 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118 (2000) is unavailing. Respondents concede that the *Koenick* court properly found standing because "tax dollars funded the paid, statutory holidays" on Good Friday and Easter Monday. (OB, 22) Likewise, in this case (as the district court found) tax dollars funded the salaries of the teachers who engaged in the challenged activities.

Respondents' "distinction" could thus be formulated as the full-salaried-day rule: if a municipality pays a public school teacher for a full day of challenged activity (such as taking a religious holiday), there is municipal taxpayer standing, but if the challenged activity (such as directing children to make images of a Hindu god) involves less than a full day's salary, there is no standing. That result is absurd.

The pair of Fifth Circuit cases respondents cite are inapposite, since neither involved participation in challenged activities by teachers or other salaried employees. *Doe v. Madison School District No. 321,* 177 F.3d 789 (9th Cir. 1999) (student-led prayer involving no expense); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (distribution of Gideon Bibles by Gideons) Indeed, the *Duncanville* court indicated that the result would have been different had salaried

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[3] The circuit court does appear to have assumed, however, that activities which first occurred in one Bedford school could not occur again in another Bedford school. (App. 50a)

teachers merely handled the Gideon Bibles. 70 F.3d at 408 There is far more teacher activity involved here.

The circuit court's conflict with the Fourth Circuit's decision in *Koenick* presents an excellent opportunity for this Court to clarify the law on municipal taxpayer along the lines suggested by four justices in *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 613 (1989)—namely, that municipal taxpayers can show direct and immediate injury from improper municipal expenditures, given their close relation to the municipal burse.

If the ACLU and local residents had standing to challenge placement of a Catholic organization's Nativity scene on public property without any county tax expenditure, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), then surely Petitioner had standing to challenge blatant First Amendment violations by salaried teachers of a school district her taxes support, and in which she still has two children.

The requested clarification of the law of standing would prevent manipulation of the standing requirement to avoid the merits of disfavored but meritorious claims, as happened here.

Respectfully submitted,

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